Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

Whether state law damages claims for pesticide-related agricultural crop injury are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (2000), where the claims seek to hold a pesticide manufacturer liable for advertising statements that repeat the information contained on nationally uniform product labeling that has been approved by the United States Environmental Protection Agency ("EPA").

Whether FIFRA pre-emption of labeling-related damages claims is limited to the specific subjects that EPA reviews at the time it first approves a pesticide product's labeling.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner American Cyanamid Company is a wholly owned subsidiary of Wyeth. No other publicly held company owns 10% or more of Petitioner's stock.

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OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 79 S.W.3d 21 (Tex. 2002), and is reproduced in Appendix A at 1a. The opinion of the 11th Court of Appeals, Eastland, Texas, which the state supreme court affirmed, is reported at 32 S.W.3d 916 (Tex. Ct. App. 2000), and is reproduced in Appendix B at 15a. The state district court's unpublished final judgment granting summary judgment in favor of Petitioner, which the state court of appeals reversed, is reproduced in Appendix C at 25a. The district court's letter opinion, which preceded its final judgment, is reproduced in Appendix C at 27a.

JURISDICTION

The Texas Supreme Court's decision was rendered on June 6, 2002. This Court has jurisdiction under 28 U.S.C. § 1257 because the Texas Supreme Court's federal pre-emption opinion below is a "final judgment" within the meaning of 28 U.S.C. § 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483-84 (1975).

There are "at least four categories of . . . [state supreme court] cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477. The Court has found jurisdiction appropriate in such cases because "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Under the fourth category of cases recognized in *Cox*, a state court decision is final for purposes of § 1257

> where the federal issue has been *finally decided* in the state courts with further proceedings pending [and] where *reversal of the state court on the federal issue would be preclusive of any further litigation* on the relevant cause of action rather than merely controlling the nature and character of, or determining admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision *might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83 (emphasis added). *Accord Florida v. Thomas*, 532 U.S. 774, 777, 780 (2001); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-57 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988).

The Texas Supreme Court's opinion falls squarely within the foregoing category of cases, and therefore, it is a "final judgment" under § 1257. The federal pre-emption issue addressed in the opinion – whether pesticide labeling-related state law damages claims for agricultural crop injury are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") – has been finally determined by the Texas Supreme Court for purposes of the state litigation. The state supreme court held that FIFRA does not pre-empt such claims, and remanded the case to the trial court. There is nothing that the trial court now could do that would affect the Texas Supreme Court's ruling that Respondents' labeling-related crop injury claims are not pre-empted.

As a result, reversal of the Texas Supreme Court's federal pre-emption opinion would be "preclusive of any further litigation on the relevant cause[s] of action." *Cox*, 420 U.S. at 482-83. If this Court were to reverse the opinion below and hold that labeling-related crop injury claims are

pre-empted by FIFRA, Petitioner American Cyanamid Company would be entitled to judgment on Respondents' state law claims since, as the state courts found, they "[a]ll . . . relate directly or indirectly to the product label." App. B at 16a. In other words, given that *all* of Respondents' claims are labeling-related, the federal pre-emption question addressed by the Texas Supreme Court is dispositive of this case.

Furthermore, "a refusal immediately to review" the Texas Supreme Court's ruling would "seriously erode [the] federal policy" underlying the federal pre-emption issue in this case. *Cox*, 420 U.S. at 483. That federal policy is Congress' mandate that every FIFRA-registered pesticide product be accompanied by its own nationally uniform product labeling regulated *solely* by EPA, and not by the States. *See* 7 U.S.C. § 136v(b) ("Uniformity"). Unless reviewed and reversed by this Court, the Texas Supreme Court's decision will erode that federal policy by allowing individual Texas state court juries to destroy national labeling uniformity through imposition of damages awards for labeling-related crop injury claims, and potentially for other types of labeling-related claims as well.

As in *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983), the state supreme court "finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding" federal policy. Thus, the Texas Supreme Court's opinion is a "final judgment" for purposes of § 1257.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. § 136v(b) provides as follows:

> **Uniformity.**
>
> Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136a(c)(5) provides in pertinent part as follows:

> **Approval of registration**
>
> . . . In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

The texts of 40 C.F.R. §§ 158.540(b)(1) and 158.640(b)(1) are set forth in Appendix D.

STATEMENT OF THE CASE

This state law damages suit involves agricultural crop injury allegedly caused by a "tank mix" (i.e., an on-the-farm combination) of two herbicides (i.e., weed control pesticides), which were manufactured by Petitioner American Cyanamid Company ("Cyanamid"). Respondents, Texas peanut growers, allege that the combination of the two products, Pursuit and Prowl, was phytotoxic (i.e., poisonous) to their 1993 crop. According to Respondents, the tank mix stunted the roots of their young peanut plants; the plants

yellowed rather than developed healthy foliage; and they produced substantially less peanuts than normal plants. Respondents do not contend that the herbicides were ineffective in controlling weeds that interfere with peanut crops.

Both herbicides were granted registrations by the United States Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (2000), the comprehensive federal pesticide statute. Cyanamid distributed both herbicides with nationally uniform product labeling approved by EPA pursuant to that statute. The EPA-approved labeling for Pursuit *specifically stated that the product can be tank mixed with Prowl* to control certain types of weeds that interfere with peanut crops.

Respondents allege that they relied upon Cyanamid magazine advertisements and brochures which indicated that Pursuit can be tank mixed with Prowl for use on peanut crops. Their Third Amended Petition in the Eastland, Texas state district court includes causes of action against Cyanamid for breach of express and implied warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act.

Cyanamid moved for summary judgment on several grounds, including that § 136v(b) of FIFRA, which expressly prohibits the States from imposing "any requirements for labeling" that are "in addition to or different from" the labeling requirements imposed under FIFRA by EPA, pre-empts all of Respondents' claims. 7 U.S.C. § 136v(b). A substantial, nationwide body of federal and state case law holds that § 136v(b) expressly pre-empts state law damages claims that directly or indirectly implicate the adequacy or accuracy of the information contained on EPA-approved pesticide labeling. *See, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Etcheverry v. Tri-Ag Serv., Inc.*,

993 P.2d 366 (Cal. 2000); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995).

The district court found that Cyanamid is "entitled to summary judgment as a matter of law as to each of plaintiffs' claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA." App. C at 28a. Accordingly, the district court entered final judgment dismissing the suit on the ground of FIFRA pre-emption. *Id.* at 25a.

Respondents appealed to the 11th Court of Appeals, Eastland, Texas. The court of appeals agreed that "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." App. B at 16a. Moreover, the court found that the "off-label" advertising statements on which Respondents base their claims "*merely repeated information on the labels*." *Id.* at 16a, n.2 (emphasis added). The court of appeals held, however, "that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product." *Id.* at 24a. As a result, the court of appeals reversed the district court's final judgment and remanded the case.

Cyanamid appealed to the Supreme Court of Texas. After requesting and receiving briefs on the merits of the FIFRA pre-emption issue, the state supreme court granted review. Cyanamid argued both that § 136v(b) of FIFRA expressly pre-empts Respondents' labeling-related damages claims, and also that the claims are barred under the doctrine of implied conflict pre-emption. Respondents contended that their claims are not pre-empted, and alternatively, that the trial court and court of appeals erred in holding that all of their claims are labeling-related.

The Texas Supreme Court held in *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995), that "FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling." In its opinion below, however, the court distinguished *Quest* on the ground that it "involved a claim for personal injury while this case involves a claim for target crop damage." App. A at 13a. "[A]cknowledg[ing] that many jurisdictions that have considered this issue have reached the opposite result," the Texas Supreme Court held that § 136v(b) of FIFRA does not pre-empt labeling-related damages claims involving agricultural crop injury. *Id.* at 12a. According to the court,

> it is not the breadth of preemption, but rather the breadth of the congressionally created exception to express preemption that determines the outcome.
>
> . . . Congress has dictated that state actions regarding product labeling are preempted to the extent that the content of the product label is regulated. But Congress has permitted its regulatory body, the Environmental Protection Agency, to choose NOT to regulate product labeling with respect to how well a product works, that is, the product's "efficacy." Central to this case, the EPA has also chosen to define product efficacy to include "target area phytotoxicity," that is, the effect of a particular product or combination of products on the crops that are deliberately sprayed. Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under

> FIFRA, we conclude that state common-law claims about target area crop damage are not preempted.

App. A at 1a-2a. Thus, the Texas Supreme Court affirmed the court of appeals' judgment that FIFRA does not pre-empt Respondents' claims. The state supreme court did not disturb the findings of the court of appeals and trial court that all of Respondents' claims are directly or indirectly related to the herbicide products' EPA-approved labeling. Nor did the state supreme court consider whether the claims are impliedly pre-empted.

REASONS FOR GRANTING THE PETITION

I. THE TEXAS SUPREME COURT'S OPINION THAT FIFRA DOES NOT PRE-EMPT PESTICIDE LABELING-RELATED DAMAGES CLAIMS INVOLVING AGRICULTURAL CROP INJURY DIRECTLY CONFLICTS WITH THE OPINIONS OF THE CALIFORNIA SUPREME COURT AND THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

This case raises the important, frequently recurring federal question of whether FIFRA pre-empts state law agricultural crop injury claims which seek to impose liability upon pesticide manufacturers for distributing pesticides with, or making advertising or promotional statements that repeat the information on, EPA-approved product labeling.

California and Texas are the nation's two leading agricultural producers.[1] The agricultural economies of both

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[1] California and Texas, respectively, are the leading two states in farm receipts and market value of agricultural products sold. *See* Caroline S. Gleaton & Carl G. Anderson, *Facts About Texas and U.S. Agriculture*, Texas Cooperative Extension, Dept. of Agricultural Economics, The

(Footnote cont'd on next page.)

of those states, as well as other states, depend upon the availability of a wide variety of herbicides, insecticides, fungicides, and other types of pesticides essential to crop production. As a result of the opinion below, however, the Texas and California supreme courts now are irreconcilably split on the issue of whether pesticide manufacturers can market FIFRA-registered pesticides without being subjected to failure-to-warn or other labeling-related state law damages claims for agricultural crop injury allegedly caused by use of pesticides in the manner required or authorized by their EPA-approved labeling. This direct conflict between the highest courts of the nation's two most important agricultural states creates significant legal uncertainty and unpredictability which could lead to serious adverse economic consequences for farmers and the public as well as pesticide manufacturers.

In *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000), a case analogous to this one, California walnut growers alleged that their 1993 crop was injured due to the phytotoxic effect of a tank mix combination of two FIFRA-registered insecticides, whose EPA-approved labeling contained no warnings against applying the products together. The California state trial court held that FIFRA pre-empted the claims, and the state court of appeal reversed. On review, the California Supreme Court held that "[w]hen a claim, however couched, boils down to an assertion that a

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(Footnote cont'd from previous page.)

Texas A&M University System (April 2002); U.S. Dept. of Agriculture, 1997 Census of Agriculture, Ranking of States and Counties, Vol. 2, May 1999, at 1. In 1997, the market value of agricultural products in California was over $23 billion, and in Texas over $13 billion. 1997 Census of Agriculture at 27.

pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Id.* at 377. In reaching this conclusion, the California Supreme Court found that "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are numerous, consistent, pragmatic and powerfully reasoned." *Id.* at 368.[2]

Like Respondents here, the plaintiffs in *Etcheverry* argued that § 136v(b) does not pre-empt state damages claims involving phytotoxic crop injury. Unlike the Texas Supreme Court, however, the California Supreme Court rejected that contention. *See Etcheverry*, 993 P.2d at 374-76. More specifically, the *Etcheverry* court found, *inter alia,* that EPA's so-called efficacy data waiver (which normally waives the submission of efficacy data – in other words, product effectiveness data – at the time an agricultural pesticide is first registered), is "beside the point" since "[p]hytotoxicity is not a matter of efficacy." *Id.* at 375. In

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[2] Indeed, all nine federal circuits that have considered the subject in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (holding that a federal statutory prohibition against state-imposed requirements encompasses requirements imposed through state damages claims), have held that § 136v(b) of FIFRA expressly pre-empts failure-to-warn and other labeling-related damages claims. *See, e.g., Netland v. Hess & Clark Inc.*, 284 F.3d 895 (8th Cir. 2002), *petition for cert. filed* (U.S. Aug. 9, 2002) (No. 02-219); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995) (*citing Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993)); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

contrast, the Texas Supreme Court's opinion is *predicated* on the efficacy data waiver. *See* App. A at 6a (asserting that EPA's efficacy data waiver is "[e]ssential to this case").

Equally important, the Texas Supreme Court's opinion also directly conflicts with the Fifth Circuit's case law on FIFRA pre-emption of state damages claims for agricultural crop injury. In *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999), the plaintiff alleged that a FIFRA-registered herbicide not only failed to control a particular type of weed, but also caused significant phytotoxic damage to his 1995 rice crop. The U.S. Court of Appeals for the Fifth Circuit held that § 136v(b) of FIFRA pre-empts all of the plaintiff's crop injury claims. The court found that the plaintiff's claims were based on the contents of the herbicide's EPA-approved labeling, and thus, "any adverse judgment would have the 'undeniable practical effect' of imposing additional labeling standards on [the manufacturer]." *Id.* at 399 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)). Moreover, the Fifth Circuit found that the plaintiff " 'cannot automatically avoid FIFRA preemption simply because [he] challenge[s] alleged misrepresentations that were made separately from the label' . . . even off-label statements are preempted if they merely repeat information contained in the label." *Id.* at 400 (quoting *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997)). *Accord Etcheverry*, 993 P.2d at 377.

The opinion below takes issue with *Etcheverry, Andrus,* and other crop injury cases decided by what the Texas Supreme Court conceded are the "many jurisdictions that have . . . reached the opposite result." App. A at 12a. Indeed, of the nine federal circuits which have held in light of *Cipollone* that § 136v(b) pre-empts labeling-related damages claims (*see supra*, n.2), five have applied that principle to labeling-related crop injury claims, and none have held that such claims are excluded from pre-emption.

See Andrus, 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Welchert v. American Cyanamid Co.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993).

Furthermore, in addition to the California Supreme Court's opinion in *Etcheverry*, the highest courts of several other heavily agricultural states also have held that § 136v(b) pre-empts crop injury claims insofar as they implicate a pesticide's EPA-approved labeling. *See, e.g., Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055 (Haw. 1997); *Wright v. Cropmate Co.*, 599 N.W.2d 668 (Iowa 1999); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Pfeifer v. E.I. du Pont de Nemours & Co.*, 606 N.W.2d 773 (Neb. 2000); *Eide v. E.I. du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *see also Barnes v. Sandoz Crop Prot. Corp.*, 938 P.2d 95 (Ariz. Ct. App. 1997); *M & H Ent. v. Tri-State Delta Chems., Inc.*, 984 S.W.2d 175 (Mo. Ct. App. 1998); *but see Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1053 (Mont. 2000), *cert. denied* 122 S. Ct. 40 (2001) (personal injury case overruling prior crop injury decision in *McAlpine v. Rhone-Poulenc Ag Co.*, 947 P.2d 474 (Mont. 1997), on ground that § 136v(b) does not pre-empt *any type* of labeling-related state damages claim); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746, 755 (Wis. 1995).

Here, as the Texas Court of Appeals explained, "[a]ll of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." App. B at 16a. If this or a similar case had been brought in a California state court, all labeling-related crop injury claims would be held pre-empted. *See Etcheverry*, 993 P.2d at 374-78. Likewise, if a Texas federal

district court were called upon to review such claims, they would be held pre-empted. *See Andrus*; *see also Dow AgroSciences, LLC v. Bates*, 205 F. Supp. 2d 623 (N.D. Tex. 2002), *appeal docketed*, No. 02-10908 (5th Cir. Aug. 16, 2002) (declaratory judgment action holding based on *Andrus* that FIFRA pre-empts the labeling-related damages claims of numerous Texas farmers who allege that their peanut crops were injured due to the plaintiff manufacturer's allegedly ineffective peanut herbicide). But unless the Texas Supreme Court's opinion below is reversed, labeling-related crop injury claims will *not* be held pre-empted in Texas state courts, where the vast majority of Texas crop injury suits are filed. Instead, pesticide manufacturers such as Cyanamid will be subjected to trial, and potentially large damages awards, merely for making promotional statements that repeat the information on their products' EPA-approved labeling (such as the information that one herbicide can be tank mixed with another for use on a particular crop).

The Texas Supreme Court's opinion creates an intolerable conflict which warrants this Court's immediate review. To be sure, there is no widespread split of authority regarding, or need for this Court to review, the fundamental principle that § 136v(b) of FIFRA expressly pre-empts state damages claims, such as failure-to-warn claims, that implicate the adequacy or accuracy of the information contained on EPA-approved product labeling.[3] This Court should resolve, however, the conflict created by the Texas Supreme Court's opinion below on the significant issue of whether labeling-related damages claims that involve

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[3] The certiorari petition pending in *Netland v. Hess & Clark Inc.*, No. 02-219, asserts that the Court should review this fundamental, widely accepted FIFRA pre-emption principle.

agricultural crop injury somehow are excluded from § 136v(b)'s pre-emptive scope.

II. THE TEXAS SUPREME COURT'S OPINION IS PREDICATED ON A FUNDAMENTAL MIS-INTERPRETATION OF FIFRA WHICH SERIOUSLY UNDERMINES CONGRESS' UNEQUIVOCAL MANDATE THAT NATIONALLY UNIFORM PESTICIDE LABELING BE REGULATED SOLEY BY THE FEDERAL EPA, AND NOT BY THE STATES

A. The Texas Supreme Court's Opinion Is Based On An Erroneous Interpretation Of § 136v(b)

FIFRA is a "comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984) (discussing FIFRA's statutory scheme). Under the federal/state "regulatory partnership" established by FIFRA, the States share responsibility with the federal EPA for regulating the sale and use of pesticides, but pesticide "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 615 (1991); *see* 7 U.S.C. § 136v ("Authority of States"). Congress intended FIFRA's pre-emption provision, § 136v(b), "to completely preempt State authority in regard to labeling," and thereby to establish a system of nationally uniform product labeling regulated solely by EPA. H.R. Rep. No. 92-511, at 16 (1971). Except for the addition of the title "Uniformity" in 1988, § 136v(b) has remained unchanged since its enactment in 1972, when Congress

"significantly strengthened FIFRA's registration and labeling standards." *Mortier*, 501 U.S. at 601.[4]

Section 136v(b) is a broad, self-operating pre-emption provision, and it contains no exceptions: Imposition of "*any*" state requirements for labeling "in addition to or different from" EPA's labeling requirements is expressly pre-empted. 7 U.S.C. § 136v(b) (emphasis added). Accordingly, as the California Supreme Court explained in *Etcheverry*, "Congress did not give the EPA [a] role in implementing" § 136v(b) or "in determining the scope of preemption under" it. 993 P.2d at 373 (citing *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D. Wis. 1997), *aff'd* 131 F.3d 656 (7th Cir. 1997)). As a result, nothing in FIFRA authorizes EPA to promulgate regulations, publish guidelines, or adopt policies, that have the effect of limiting, or creating exceptions to, § 136v(b). *Id.* at 373-74.

According to the Texas Supreme Court's opinion below, however, "EPA regulations define 'the domain expressly pre-empted' " by § 136v(b). App. A at 4a (quoting *Cipollone v. Liggett Group,* 505 U.S. at 517). Much of the Texas Supreme Court's opinion is devoted to a discussion of

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[4] Every pesticide product not only must be granted a registration by EPA pursuant to FIFRA, but also must be distributed with EPA-approved product labeling. *See* 7 U.S.C. § 136a ("Registration of Pesticides"); *see also id.* § 136j(a)(2)(A) (making it unlawful to alter EPA-approved labeling); 40 C.F.R. § 152.130(a) ("Distribution under approved labeling"). Before registering a pesticide product, EPA must determine that "its labeling . . . compl[ies] with the requirements of [FIFRA]," and that the product, when applied in accordance with its labeling, "will perform its intended function without unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5). "The term 'environment' includes water, air, land, and *all plants* and man and other animals living therein, and the interrelationships which exist among these." *Id.* § 136(j) (emphasis added).

EPA's waiver of efficacy data (i.e., product effectiveness data) pursuant to 7 U.S.C. § 136a(c)(5) at the time a pesticide product is first registered, and why "target area phytotoxicity" supposedly is included within that partial waiver. *Compare Etcheverry*, 993 P.2d at 374-76 (discussing why phytotoxicity and efficacy are "distinct concepts," and thus, why the efficacy data waiver is "irrelevant"). Based on EPA's efficacy data waiver, the Texas Supreme Court concluded as follows:

> Because the EPA does not evaluate whether a product will be toxic to the crops that it was intended to assist, the EPA does not regulate a product's labeling claims on this subject. Because the scope of FIFRA's preemption is dependent on what the EPA regulates, FIFRA does not preempt [Respondents'] common law crop-damage claim.

App. A at 14a.

There are glaring flaws with this reasoning.

First, the opinion below is predicated on the Texas Supreme Court's erroneous notion that "Congress has dictated that state actions regarding product labeling are preempted *to the extent that the content of the product label is regulated*." *Id.* at 1a (emphasis added). There is no statutory basis for this assertion, or for the court's declaration that "without EPA regulation, there can be no preemption." *Id.* at 13a. Nothing in FIFRA provides that there must be a specific EPA labeling requirement on a particular subject (e.g., prevention of target area phytotoxicity) in order for § 136v(b) to pre-empt the States from imposing their own labeling requirements on that subject. Instead, the plain, broad language of § 136v(b) not only pre-empts "any" state requirements for labeling that are "different from," but also "any" that are "*in addition to,*" those required under FIFRA by EPA. 7 U.S.C. § 136v(b) (emphasis added). As a result, regardless of what particular

subjects EPA's labeling requirements encompass, § 136v(b) expressly preempts the States from adding their own labeling requirements, including by means of state damages awards. *See Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992) (construing "the prohibition against state labeling requirements 'in addition to' those in FIFRA to preempt the imposition of categories of labeling restrictions not provided by the federal law"). In other words, consistent with Congress' goal of national labeling uniformity, § 136v(b) expressly pre-empts the States from filling any supposed gaps in EPA's regulation of pesticide labeling.[5]

Second, contrary to the Texas Supreme Court's opinion below, the so-called "efficacy data waiver" included within § 136a(c)(5) of FIFRA is not some sort of exemption from, or exception to, § 136v(b). *See Etcheverry,* 993 P.2d at 374-76. The "waiver," enacted in 1978, provides that "[i]n considering an application for the registration of a pesticide, the Administrator [of EPA] *may* waive data requirements pertaining to efficacy." 7 U.S.C. § 136a(c)(5) (emphasis added). Neither the text of this data waiver authorization (which appears in the section of FIFRA entitled "Approval of registration"), nor its legislative history, refers to § 136v(b), which was enacted six years

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[5] In *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 248 (3d Cir. 1999) (a personal injury case), the Third Circuit asserted that "the pre-emptive effect of FIFRA is dependent on agency regulations." Despite that misreading of § 136v(b), it correctly concluded, based upon EPA's "absolute control of labeling regulation," and the "comprehensiveness of the regulations," that FIFRA pre-empts labeling-based state law claims. *Id.* at 251, 252. The court found that "the EPA's requirements for labeling pesticides are sufficiently specific to mandate preemption of claims based on state statutes or common law . . . To hold otherwise would be *to impose labeling requirements additional to those mandated by the EPA*." *Id.* (emphasis added).

earlier. It seems highly unlikely that Congress would have intended the efficacy data waiver authorization to effect a major limitation on the otherwise broad pre-emptive scope of § 136v(b) without ever mentioning such an intention, much less without amending the unequivocal text of § 136v(b) itself. "When Congress intends to preempt state regulatory authority but to leave common law actions intact, it knows how to accomplish that." *Etcheverry*, 993 P.2d at 372. Furthermore, even if there were some evidence that Congress in 1978 had considered the effect of the efficacy data waiver authorization on pre-emption, " 'the views of a subsequent Congress form a hazardous basis for inferring the [pre-emptive] intent of an earlier one.' " *Cipollone*, 505 U.S. at 520 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). "Of equal significance is the fact that Congress [which enacted major amendments to FIFRA in 1996] has remained silent in the face of *Cipollone* and its FIFRA progeny." *Hue v. Farmboy Spray Co.*, 896 P.2d 682, 691 (Wash. 1995). Congress could have "enact[ed] corrective legislation," if it believed that the cases holding that § 136v(b) pre-empts labeling related crop injury claims were inconsistent with the statute. *Id.*

Third, the Texas Supreme Court's opinion incorrectly assumes that EPA's implementation of FIFRA's efficacy data waiver authorization (even assuming that the waiver includes target area phytotoxicity data) means that EPA does not regulate "whether products are toxic to target area crops," and hence, that EPA does not regulate product labeling to prevent crop injury due to phytotoxicity. App. A at 12a. To the contrary, "[a]lthough the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial registration, the agency does require and review such data if efficacy-related problems develop later." *Etcheverry*, 993 P.2d at 375. Indeed, EPA emphasized this point when it promulgated its efficacy data waiver regulation. *Id.* at 375-76; *see* 40 C.F.R. § 158.640(b)(1)

("each registrant must ensure through testing that his products are efficacious *when used in accordance with label directions* . . . [t]he Agency reserves the *right to require*, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration") (emphasis added); *see also* 44 Fed. Reg. 27,938, 27,939 (1979) (explaining that an efficacy data "request may be made for any product for which a pattern of inadequate performance has been reported"). Hence, insofar as target area phytotoxicity data are included within the efficacy data waiver, EPA has by regulation expressly reserved the right to require submission of such data both before and after a pesticide product is registered.[6] Along the same lines, EPA's adverse effects reporting regulation "[s]ignificantly . . . provides that information need not be reported for an 'incident' which 'concerns non-lethal *phytotoxicity to the treated crop* if the *label* provides an adequate notice of such a risk.' " *Etcheverry*, 993 P.2d at 376 (quoting 40 C.F.R. § 159.184(b)(4)) (emphasis added). Thus, after an

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[6] *See also* 40 C.F.R. § 158.35(c) ("Flexibility of the data requirements"); § 158.75(a) ("Requirements for additional data").

When a manufacturer proposes to include on its product labeling directions for use of a particular tank mix, EPA's longstanding policy is to review that in advance. *See* Pesticide Regulation ("PR") Notice 82-1 (Jan. 12, 1982) ("Revised Policy on Label Claims for Tank Mixing"). PR Notice 82-1, a guidance document which the opinion below ignores, advises that "the addition of tank mix claims to labels still *requires Agency review and approval* prior to distribution." *Id.* at 2 (emphasis added). EPA "will usually approve tank mix label claims without supporting compatibility and residue data," or efficacy data, if certain conditions are met. *Id.* One of those conditions is that "[t]he pesticide product to be mixed with the product which is the subject of the [FIFRA registration] application does not contain a label prohibition against such mixing." *Id.*

agricultural pesticide product is registered, EPA can and will regulate its labeling to prevent crop injury (e.g., by requiring the manufacturer to remove a tank mix combination from the labeling, or by providing an appropriate label warning regarding the tank mix) when and if EPA determines that it is necessary to do so. *See id.* at 375 (discussion of "The EPA's postregistration consideration of efficacy"); *see also Kuiper v. American Cyanamid Co.*, 131 F.3d at 663-65 (discussing EPA regulation of labeling to prevent crop injury due to herbicide phytotoxicity).[7]

Fourth, to the extent that EPA affirmatively has determined not to regulate efficacy or phytotoxicity on pesticide labeling, but instead to allow the marketplace to "regulate" those subjects, the Texas Supreme Court failed to recognize that a "federal decision to forgo regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). Therefore, if EPA's " 'failure ... affirmatively to exercise [its] full authority takes on the character of a ruling that no such regulation is appropriate or

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[7] The Texas Supreme Court's opinion affords deference to 40 C.F.R. § 158.540(b)(1), which provides that target area phytotoxicity data are required for Special Review circumstances. *See* App. A at 6a. The Special Review process enables EPA to review any significant post-registration risk concerns regarding one or more uses of a pesticide and to determine what regulatory actions the manufacturer must take, such as revision or addition of label warnings, in order to maintain the pesticide's FIFRA registration. *See* 40 C.F.R. pt. 154. As a result, EPA's requirement in § 158.540(b)(1) that target area phytotoxicity data are required for Special Reviews further confirms that EPA regulates labeling to prevent phytotoxic crop injury when circumstances make that necessary.

approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

B. The Texas Supreme Court's Opinion Erodes Congressional Policy

Congress long has considered EPA-approved product labeling to be "the final authority" governing the application of a pesticide. S. Rep. No. 95-334, at 4 (1977); *see* 7 U.S.C. § 136j(a)(2)(G) (making it unlawful to use a pesticide in a manner inconsistent with its labeling). Respondents' state law damages claims, however, unavoidably challenge the EPA-approved product labeling which explicitly authorized Pursuit to be applied in a tank mix combination with Prowl to control weeds that attack peanut crops. Unless pre-empted, Respondents' claims, all of which are based on Cyanamid advertising and promotional statements repeating the information on the labeling that Pursuit can be tank mixed with Prowl for use on peanut crops, would enable a Texas state trial court to be the "final authority" regarding that tank mix combination.

Allowing juries to oversee (or more probably, simply ignore) EPA's regulation of labeling would permit a Texas state court jury to impose liability upon Cyanamid for marketing its FIFRA-registered pesticide products with EPA-approved labeling that authorized the tank mix. In other words, labeling-related claims such as Respondents' would allow state trial courts "to sit, in effect, as super-EPA review boards," second-guessing the content of EPA-approved labeling, and subjecting pesticide manufacturers to liability for failure of the EPA-approved labeling to satisfy any state-imposed tort or other requirements. *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 73 (8th Cir. 1995). That would directly conflict with Congress' mandate,

reflected in § 136v(b), that each pesticide product be distributed with nationally uniform labeling regulated exclusively by EPA. *See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 162 (10th Cir. 1992) ("State court damage awards . . . would constitute ad hoc determinations of the adequacy of statutory labeling standards [which] would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards."); *see also Etcheverry*, 993 P.2d at 376 ("having lay juries assess questions of phytotoxicity in the context of failure-to-warn claims is neither necessary nor desirable, and holding that such actions are preempted by FIFRA promotes federalism, rather than undermines it").

Moreover, the potential ramifications of the Texas Supreme Court's "no EPA regulation, no pre-emption" misinterpretation of § 136v(b) are not limited to labeling-related claims alleging phytotoxic crop injury. Under the state supreme court's theory, any failure-to-warn or other labeling-related personal injury or crop injury claim involving *any* subject that EPA chooses not to review or regulate at the time a pesticide product is first registered would be exempt from pre-emption.

The inevitable resultant erosion of Congress' mandate that pesticides be distributed with labeling regulated solely by EPA, and that the States not impose their own additional or different requirements for pesticide labeling, is a compelling reason why this Court should review the Texas Supreme Court's opinion.[8]

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[8] The Texas Supreme Court, having found that § 136v(b) does not expressly pre-empt labeling-related crop injury claims, failed to consider whether such claims are barred under the doctrine of implied conflict pre-emption. (Cyanamid argued below that Respondents' claims are both expressly *and* impliedly pre-empted.) In *Geier v. American Honda*

(Footnote cont'd on next page.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Footnote cont'd from previous page.)

Motor Co., 529 U.S. 861, 869 (2000), this Court reaffirmed that an "express pre-emption provision . . . does *not* bar the ordinary working of conflict pre-emption principles" (emphasis in original). *See also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (an argument "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute . . . is without merit"). The Texas Supreme Court's opinion erred, therefore, by viewing this as strictly "an express preemption case." App. A at 3a.

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 01-0008

AMERICAN CYANAMID COMPANY, PETITIONER,
v.
TERRY GEYE AND BRANDON GEYE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued Nov. 7, 2001

JUSTICE ENOCH delivered the opinion of the Court.

The question is whether the Federal Insecticide, Fungicide, and Rodenticide Act[1] ("FIFRA") and its implementing regulations preempt state common-law damage claims for crop damage--specifically, damage to peanut plants. Ordinarily in federal preemption cases, we are asked to decide the scope of preemption, whether congressionally expressed or implied. But in this case, it is not the breadth of preemption, but rather the breadth of the congressionally created exception to express preemption that determines the outcome.

As we explain, Congress has dictated that state actions regarding product labeling are preempted to the extent that the content of the product label is regulated. But Congress has permitted its regulatory body, the Environmental Protection Agency, to choose NOT to regulate product labeling with respect to how well a product

[1] 7 U.S.C. §§ 136-136y.

works, that is, the product's "efficacy." Central to this case, the EPA has also chosen to define product efficacy to include "target area phytotoxicity," that is, the effect of a particular product or combination of products on the crops that are deliberately sprayed. Simply put, the EPA does not regulate herbicide labels regarding how well a product works, and this includes if the product actually injures the crops it was intended to assist. Because of the EPA's choice not to regulate, and therefore because there are no labeling or packaging requirements regarding crop damage imposed under FIFRA, we conclude that state common-law claims about target area crop damage are not preempted. Thus, the Geyes' claims are not preempted.

I

Terry Geye and his son Brandon are peanut farmers. The summary judgment evidence shows that in 1993 they treated part of their peanut crop with a mixture of the herbicides Pursuit and Prowl, both of which American Cyanamid manufactures. In selecting the Pursuit-Prowl combination, the Geyes claim they relied on various labels and advertisements that specifically stated that Pursuit could be "tank mixed" with Prowl. The advertisements also stated that Pursuit was a sound choice for crop safety and that it does not cause injury to peanut plants. But the Geyes allege that applying the Pursuit-Prowl mix to their fields actually injured their peanut plants. The Geyes assert that the Pursuit-Prowl mix stunted root growth and inhibited foliage development which resulted in a 3,000-pound per acre reduction in crop yield.

The Geyes sued American Cyanamid. They alleged breach of express and implied warranties, strict liability, and violation of the Texas Deceptive Trade Practices Act. American Cyanamid filed a motion for summary judgment, asserting that FIFRA preempted the claims. The trial court agreed and dismissed the claims. The court of appeals

reversed, holding that FIFRA did not preempt the Geyes' crop-damage claim.[2] We affirm the judgment of the court of appeals.

II

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[3] "A state law is preempted and 'without effect' if it conflicts with federal law."[4] Congressional intent determines whether a federal statute preempts state law.[5] Preemption may be determined by the express provisions provided by Congress.[6] It may also be implied if the statute's scope indicates that Congress intended federal law to occupy the field, or when state law actually conflicts with federal law.[7] Finally, preemption based on an actual conflict may still exist even if the claim is not expressly preempted under the relevant statute.[8]

This is an express preemption case. FIFRA contains an express preemption clause that provides that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[9] Preemption of state law claims

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2 32 S.W.3d 916, 921.

3 U.S. Const. art. VI, cl. 2.

4 *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 4 (Tex. 1998) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

5 *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366-67 (Tex. 1998) ("We are ... bound to give effect to the will of Congress.").

6 *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

7 *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

8 *See Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861, 884 (2000); *see also Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 741 (Tex. 2001).

9 7 U.S.C. § 136v(b).

under this provision is linked to the labeling and packaging requirements imposed by FIFRA. Under this Act, Congress has given the EPA the role of evaluating and determining the content of pesticide labels.[10]

> The Administrator is authorized ... to prescribe regulations to carry out the provisions of this Act. Such regulations shall take into account the difference in concept and usage between various classes of pesticides, including public health pesticides, and differences in environmental risk and the appropriate data for evaluating such risk between agricultural, nonagricultural, and public health pesticides.[11]

Consequently, the EPA regulations define "the domain expressly pre-empted."[12] Because the EPA's labeling requirements determine what state actions are preempted, we cannot know whether the Geyes' crop-damage claim is preempted until we determine what the EPA requires for product labels concerning crop safety.

III

A

FIFRA is a comprehensive federal statute regulating pesticide use, sales, and labeling, and granting enforcement authority to the EPA.[13] The Act provides a detailed scheme for regulating the content and format for labeling herbicides. Under FIFRA, all herbicides sold in the United States must be registered with the EPA.[14] Each manufacturer must submit to the EPA a statement that includes a "complete

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10 *See id.* § 136w(a)(1).

11 *Id.*

12 *Cipollone,* 505 U.S. at 517.

13 *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 601 (1991).

14 7 U.S.C. § 136a(a).

copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use."[15] Each manufacturer must also submit "the complete formula of the pesticide"[16] and "a full description of the tests made and the results thereof upon which the claims are based."[17] After evaluating this information, the EPA then registers a product that "perform[s] its intended function without unreasonable adverse effects on the environment."[18]

But despite FIFRA's comprehensive nature, Congress authorized the EPA in 1978 to choose not to require the submission of data relating to the "efficacy" of products.[19] "Efficacy" refers to how well a product works or, as defined by the EPA, to the "product's ability to control the specific target pest or produce the specified plant or animal response when the product is applied in accordance with the label directions ..., precautions, and limitations of use."[20] Congress said: "In considering an application for the registration of a pesticide, the [EPA] Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy."[21] The EPA, acting under this authorization, has chosen not to collect efficacy data for any products except in a specific set of circumstances that are not relevant here.[22] Essential to this

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15 *Id.* § 136a(c)(1)(C).

16 *Id.* § 136a(c)(1)(D).

17 *Id.* § 136a(c)(1)(F).

18 *Id.* § 136a(c)(5)(C).

19 *See id.* § 136a(c)(5).

20 BERNARD A. SCHNEIDER, EPA, PESTICIDE ASSESSMENT GUIDELINES, SUBDIVISION G: PRODUCT PERFORMANCE 36 (1982) (available from the National Technical Information Service pursuant to 40 C.F.R. § 158.108).

21 7 U.S.C. § 136a(c)(5).

22 *See* 40 C.F.R. § 158.640(b)(1) (waiving efficacy data "unless the pesticide product bears a claim to control pest microorganisms that

case, the EPA has also chosen to include "target area phytotoxicity" within the concept of efficacy, and therefore the EPA has chosen not to collect data concerning "target area phytotoxicity."

B

"Target area" refers to the "area intentionally treated with a pesticide when label use directions are followed [i.e., the peanut field]."[23] The EPA further defines "target area plants" as "all plants located within the target area, and includes *both desirable and undesirable species* [i.e., the peanuts and the weeds]."[24] "Target area phytotoxicity" then describes the toxic effect to both desirable and undesirable plants within the target area. The Geyes' peanuts are desirable plants that are "target area plants" and are within the "target area."

The fact that the EPA has chosen not to collect data concerning target area phytotoxicity is found principally in two places. First, the data table found in 40 C.F.R. § 158.540 identifies the data that manufacturers must submit regarding plant protection. The table limits the submission of target area phytotoxicity to "Special Review" circumstances under 40 C.F.R. § 154.1 and in "certain public health situations."[25] American Cyanamid does not assert that either of these reviews occurred in this case.

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pose a threat to human health and whose presence cannot readily be observed by the user"); 40 C.F.R. § 158.540(b)(1) (waiving target area phytotoxicity data unless required for "Special Review and certain public health situations").

[23] ROBERT W. HOLST & THOMAS C. ELLWANGER, EPA, PESTICIDE ASSESSMENT GUIDELINES, SUBDIVISION J: HAZARD EVALUATION NONTARGET PLANTS 18 (1982) (available from the National Technical Information Service pursuant to 40 C.F.R. § 158.108).

[24] *Id.* (emphasis added).

[25] 40 C.F.R. § 158.540(b)(1).

Second, the EPA has authored a set of Pesticide Assessment Guidelines that "contain the standards for conducting acceptable tests, guidance on evaluation and reporting of data, definition of terms, further guidance on when data are required, and examples of acceptable protocols."[26] Specifically, *Pesticide Assessment Guidelines, Subdivision J: Hazard Evaluation Nontarget Plants* provides:

> (d) *Target area phytotoxicity testing waiver of requirements.*
>
> (1) The Administrator has determined that efficacy test data include target area phytotoxicity testing data, and that data submittal for such testing may be waived, by his authority under FIFRA Sec. 3(c)(5) [136a(c)(5) for most kinds of pesticide products.... Such products generally include all pesticides whose uses result in direct or indirect application to plants in the target area such as agricultural, lawn, and garden use.
>
> (2) Even though the Administrator will ordinarily waive the requirement for submittal of target area phytotoxicity test data as indicated in paragraph (b)(1) of this section, he reserves the authority to require such data on a case-by-case basis whenever the Administrator deems that such data are necessary to evaluate the acceptability of a product for registration. If it is determined that data phytotoxicity for a pesticide are necessary, the Agency will promulgate the specific target area phytotoxicity data requirements by letter to a specific registrant

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26 40 C.F.R. § 158.108.

or by general notice.[27]

As well, the EPA has limited the submission of data for the specific problem that the Geyes complain about--tank mixtures:

> (5) *Tank Mixtures*. When tank mixtures are recommended on product labeling, a study may be required on a case-by-case basis to demonstrate the extent of antagonism and synergism with respect to detrimental effects on *nontarget plants* by the products of tank mixtures.[28]

The EPA did not evaluate whether the tank-mixed Pursuit-Prowl combination had a toxic effect on peanut plants. It therefore could not evaluate the label claims made by American Cyanamid which stated that the combination was safe to use on peanut plants. It thus exercised no regulatory authority over American Cyanamid's label that specifically allowed the tank mixing of Pursuit and Prowl.

C

As a federal regulation, Section 158.540 is entitled to deference.[29] This regulation establishes that manufacturers submit target area phytotoxicity data only when the pesticide is subject to "Special Review"[30] or in "certain public health situations."[31] Nothing in the record suggests that the EPA evaluated the specific claims made on the label stating that Pursuit could be tank mixed with Prowl.

While *Subdivision J* is not entitled to the same deference as

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27 SUBDIVISION J at 15.

28 SUBDIVISION J at 29 (emphasis added).

29 *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

30 40 C.F.R. § 154.1.

31 40 C.F.R. § 158.540(b)(1).

an agency regulation, it may have the "power to persuade."[32] The EPA's choice not to evaluate efficacy claims has been consistent. In a proposed rule, first announced in 1979, the Agency explained that the choice "stemmed from a need to reduce the amount of resources devoted to reviewing product performance so that additional effort could be devoted to the evaluation of health and safety data."[33] In choosing not to evaluate the data regarding efficacy, the EPA relied on the marketplace to ensure that products were effective and did not "impart any detrimental effects (particularly on crops, ornamentals and other desirable plants) for which they could be liable."[34] The EPA's reliance on the marketplace found its way into *Subdivision J:* "The Agency has determined that target area phytotoxicity data does not need to be submitted because the registrants are generally willing to accept the overall responsibility of the product [with] respect to efficacy and phytotoxicity."[35]

The information contained in the *Assessment Guideline* was originally published by the EPA as a proposed rule on November 3, 1980.[36] The proposed rule was to be designated as a regulation to be published in Section 40 C.F.R. § § 163.120-1 to 163.120-4. The specific choice not to collect data on target area phytotoxicity now found in *Subdivision J* was in this proposed rule. As a proposed rule,

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32 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

33 Interim Final Regulation Relating to Conditional Registration, 44 Fed. Reg. 27932, 27938 (May 11, 1979) (to be codified at 40 C.F.R. pt. 162.).

34 Proposed Data Requirements, 47 Fed. Reg. 53192, 53196 (Nov. 24, 1982) (to be codified at 40 C.F.R. pt. 158).

35 SUBDIVISION J at 7.

36 Proposed Guidelines for Registering Pesticides in the United States: Subpart J: Hazard Evaluation: Nontarget Plants and Microorganisms, 45 Fed. Reg. 72948, 72961 (Nov. 3, 1980) (to be codified at 40 C.F.R. pts. 162, 172).

it was subject to public comment and consideration.[37] In 1981, it appears that the EPA decided not to codify Section 162.120 as a regulation and instead proposed that the information contained in proposed Section 162.120 become *Subdivision J.*[38] According to the EPA, this was to "limit the regulation to a concise presentation of the data requirements and when they are required."[39] The EPA adopted this approach, and the current regulation specifically references the *Assessment Guidelines.*[40] It appears that the *Assessment Guidelines* are essentially the EPA's directions to pesticide manufacturers on what tests to conduct, how to conduct those tests, and what data is required for registration.

In sum, the EPA has had a relatively consistent approach to not collecting data on target area phytotoxicity since at least 1980. Including target area phytotoxicity within the concept of efficacy reflects the conclusion that a product will not be considered effective by consumers if it harms the plants that it was intended to assist. It also reflects the EPA's assumption that if a manufacturer states that a product is safe to use on peanut plants, that manufacturer has made sure that the product is in fact "safe for use on peanut plants." Finally, the fact that the information in *Subdivision J* was subject to public disclosure and comment is an important factor in determining the level of deference it should receive.[41] *Subdivision J* persuades us that the EPA does not regulate label claims about target area phytotoxicity.

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37 *See* SUBDIVISION J at 1-13 (discussing public comment received on proposed regulation).

38 Proposed Data Requirements, 47 Fed. Reg. at 53192.

39 *Id.*

40 40 C.F.R. § 158.108.

41 *See Christensen v. Harris County,* 529 U.S. 576, 586-87 (2000).

D

In concluding that the Geyes' claims were not preempted, the court of appeals relied on an opinion letter issued by the EPA, *Pesticide Regulation (PR) Notice 96-4*.[42] American Cyanamid takes issue with the court of appeals' reliance on the opinion letter. *PR Notice 96-4* describes the product labeling process and details the EPA's choice not to collect efficacy data. *PR Notice 96-4* essentially concludes that state law actions should not be preempted because the EPA does not determine if a product will be "efficacious or will not damage crops or cause other property damage."[43] The court of appeals did substantially rely on *PR Notice 96-4*: "Our decision is based upon the information contained in [*Notice 96-4*], and we conclude that we should quote extensively from the EPA regulation."[44] American Cyanamid argues that *PR Notice 96-4* is a "narrowly focused legal brief thinly disguised as an EPA guidance document; it is by no means a 'regulation.' " We agree with American Cyanamid. *PR Notice 96-4* is not a regulation and the court of appeals erred in its substantial reliance on the *Notice*.

But the EPA's choice not to collect target area phytotoxicity data, as found in 40 C.F.R. § 158.540 and the EPA's *Assessment Guideline, Subdivision J, Hazard Evaluation Nontarget Plants* convinces us that the conclusion reached by the court of appeals was correct. The combination of these two sources demonstrates that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity. Thus the Geyes' crop-damage claim is not preempted.

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42 PESTICIDE REGULATION (PR) NOTICE 96-4 (June 3, 1996), *available at* http://www.epa.gov/opppmsd1/PR Notices/pr96-4.html.

43 *Id.*

44 32 S.W.3d at 918.

IV

We acknowledge that many jurisdictions that have considered this issue have reached the opposite result.[45] But all these cases are based on the premise that the EPA regulates whether products are toxic to target area crops. For example, the California Supreme Court considered the efficacy waiver in a case factually similar to ours--*Etcheverry v. Tri-Ag Service, Inc.*[46]

The plaintiffs in *Etcheverry* claimed that applying two products, Guthion and Morestan, reduced its walnut production, resulting in about $150,000 in damages.[47] The California Supreme Court held that the plaintiffs' crop-damage claims were preempted by FIFRA, concluding that the EPA's waiver of efficacy data was "beside the point" and "irrelevant"[48] because the plaintiffs were complaining about *phytotoxicity* and not *efficacy.* But in so holding, the California Supreme Court did not draw the essential distinction between phytotoxicity and target area phytotoxicity that the EPA historically has.

Likewise in *Taylor AG Industries v. Pure-Gro,*[49] the Ninth Circuit did not consider the EPA's decision to not collect target area phytotoxicity data. The court described the EPA review as "rigorous" and that "the EPA approves each label only after a careful review of the product data and the draft label."[50] Of course, that may be true for phytotoxicity

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45 *See, e.g., Andrus v. AgrEvo USA Co.,* 178 F.3d 395 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.,* 131 F.3d 656 (7th Cir. 1997); *Taylor AG Indus. v. Pure-Gro,* 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.,* 5 F.3d 744 (4th Cir. 1993).

46 993 P.2d 366 (2000).

47 *Id.* at 368.

48 *Id.* at 375.

49 54 F.3d at 560.

50 *Id.*

generally, but it is not true for target area phytotoxicity. With respect to target area phytotoxicity, the EPA makes no review. And without that review and approval process, there certainly can be no federal regulation. And without EPA regulation, there can be no preemption.

V

In *Quest Chemical Corp. v. Elam,*[51] considered FIFRA's preemptive effect in the context of a personal injury suit. We reversed the court of appeals' judgment that allowed the plaintiff's strict liability and implied warranty claims to escape federal preemption. We stated, "FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling."[52] *Quest* does not control this case. The fundamental difference is that *Quest* involved a claim for personal injury while this case involves a claim for target crop damage. The EPA continues to collect data concerning safety to humans. Regulating labeling concerning these health issues remains one of the Agency's primary mandates. After all, the EPA used concern for health and safety as one of the justifications for not evaluating efficacy claims:

> The decision to [not collect and review] efficacy [data] as an Agency policy stemmed from a need to reduce the amount of resources devoted to reviewing product performance so that additional effort could be devoted to the evaluation of health and safety data, and from a desire to reduce regulatory burdens in pesticide registration.[53]

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51 898 S.W.2d 819, 820 (Tex. 1995).

52 *Id.*

53 Interim Final Regulation Relating to Conditional Registration, 44 Fed. Reg. at 27938.

VI

This case is unlike many cases in the preemption area where we struggle to determine the breadth of federal preemption expressed in a federal statute. For here we must determine the breadth, not of the preemption itself, but of an exception to that preemption founded on Congressional authorization for the EPA to specifically choose to not collect efficacy data. Acting on that authorization, the EPA has chosen not to evaluate whether a product will be toxic to the crops it was intended to assist. Because the EPA does not evaluate whether a product will be toxic to the crops that it was intended to assist, the EPA does not regulate a product's labeling claims on this subject. Because the scope of FIFRA's preemption is dependent on what the EPA regulates, FIFRA does not preempt the Geyes' common law crop-damage claim. For these reasons we affirm the court of appeals' judgment.

Opinion Delivered: June 6, 2002

/s/_____
Craig T. Enoch
Justice

APPENDIX B

11th Court of Appeals
Eastland, Texas

Terry GEYE and Brandon Geye, Appellants,

vs.

American Cyanamid Company, Appellee

No. 11-99-00034-CV – Appeal from Eastland County

The issue in this case is whether plaintiffs' state law claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C.A. § 136 et seq. (West 1999). We hold that they are not.

Terry Geye and Brandon Geye sued American Cyanamid Company contending that the mixed application of herbicides, Prowl and Pursuit, manufactured by defendant damaged plaintiffs' peanut crop. Plaintiffs alleged theories of strict liability, breach of express and implied warranties, and violation of the Texas Deceptive Trade Practice-Consumer Protection Act (DTPA).[1] The trial court granted defendant's motion for summary judgment on the ground that plaintiffs' claims were preempted by FIFRA.

The summary judgment proof shows that plaintiffs treated some of their land with a tank mix combination of Prowl and Pursuit. The peanuts in the treated fields did not develop properly. The roots were stunted, and the plants did

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[1] TEX. BUS. & COM. CODE ANN. § 17.41 et seq. (Vernon 1987 & Pamph Supp. 2000).

not properly develop foliage. Before purchasing Prowl and Pursuit, plaintiffs relied upon off-label magazine and brochure advertisements made by defendant regarding Prowl and Pursuit. These advertisements stated that "PURSUIT can be tank mixed with other popular products such as PROWL herbicide." The Pursuit labeling specifically stated that Pursuit and Prowl may be combined by tank mixing.[2] There is summary judgment proof that plaintiffs sustained substantial loss in yield because of the combined application of Prowl and Pursuit.

All of plaintiffs' state law claims relate directly or indirectly to the product label stating that the herbicides may be combined by tank mixing. Defendant relies upon many federal and state cases that have held that state law claims against manufacturers of Environmental Protection Agency (EPA) registered pesticides which relate directly or indirectly to labeling are preempted by FIFRA. See Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3rd Cir. 1999); Andrus v. AgrEvo USA Company, 178 F.3d 395 (5th Cir. 1999); Kuiper v. American Cyanamid Company, 131 F.3d 656 (7th Cir. 1997), cert. den'd, 523 U.S. 1137 (1998); Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995); Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995); MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994); Worm v. American Cyanamid Company, 5 F.3d 744 (4th Cir. 1993); King v. E.I. Dupont De Nemours and Company, 996 F.2d 1346 (1st Cir.), cert. dism'd, 510 U.S. 985 (1993); Etcheverry v. Tri-Ag Service, Inc., 993 P.2d 366 (Cal. 2000).

The Texas Supreme Court in Quest Chemical Corporation v. Elam, 898 S.W.2d 819, 820 (Tex.1995), when

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[2] The off-label statements merely repeated information on the labels. See Kuiper v. American Cyanamid Company, 131 F.3d 656 (7th Cir. 1997).

considering the alleged failure of the manufacture of a herbicide to provide adequate warnings and instructions on its product, stated:

> FIFRA provides a detailed scheme for regulating the content and format of labeling for herbicides and other chemical substances. It requires, among other things, that all herbicides sold in this country be registered with the United States Environmental Protection Agency ("EPA"). See MacDonald v. Monsanto Co., 27 F.3d 1021, 1024 (5th Cir. 1994) (discussing the details of FIFRA labeling requirements); Worm v. American Cyanamid Co., 5 F.3d 744, 747 (4th Cir. 1993) (reviewing the preemptive scope of FIFRA). FIFRA preempts all common law tort suits against manufacturers of EPA-registered pesticides which are based solely upon claims relating directly or indirectly to labeling.

FIFRA expressly mandates that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C.A. § 136v. The preemptive effect of FIFRA is dependent on agency regulations. Hawkins v. Leslie's Pool Mart, Inc., supra. The court in Welchert v. American Cyanamid, Inc., supra at 71, described the role of the EPA as:

> FIFRA creates a comprehensive scheme for the regulation of pesticide labeling and packaging. See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 601 (1991). Furthermore, all pesticides sold in the United States must be registered with the Environmental Protection Agency (EPA).

> See 7 U.S.C. § 136a(a). "The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides." Worm v. American Cyanamid Company, 5 F.3d at 747. FIFRA establishes a complex process of EPA review that culminates in the approval of a label under which a product may be marketed. Manufacturers must submit draft label language addressing a number of different topics, including ingredients, directions for use, and adverse effects of the products, see 7 U.S.C. § 136a(c); 40 C.F.R. § 152.50 & pt. 156, and a final label must be submitted to the EPA prior to registration. 40 C.F.R. § 156.10(a)(6).

On June 3, 1996, the EPA office of Pesticide Programs issued Pesticide Regulation (PR) Notice 96-4. Our decision is based upon the information contained in that official notice, and we conclude that we should quote extensively from the EPA regulation.[3] (PR) Notice 96-4 provides in part:

> EPA is issuing this notice at this time to correct a misunderstanding regarding the FIFRA label approval process and efficacy claims that is reflected in a series of court decisions concerning the preemptive effect of FIFRA.

II. LEGAL FRAMEWORK

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[3] (PR) Notice 96-4 has only recently been discussed by the courts. It was not urged in the trial court in this case.

A. Registration and the Label Approval Process

EPA approves pesticide labels in the process of registering a pesticide under FIFRA. FIFRA specifies that EPA shall register a pesticide if:

> (1) its composition is such as to warrant the proposed claims for it;
>
> (2) its labeling and other material required to be submitted comply with the requirements of this Act;
>
> (3) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (4) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136c(c)(5). Although the first registration requirement identified above mandates that EPA consider efficacy of label claims, Congress, in 1978, explicitly gave EPA the authority to waive that requirement. FIFRA states:

> In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy.

EPA has acted under this authority to waive, by regulation, data requirements as to efficacy issues for all agricultural pesticides. 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979); 40 CFR 158.640(b)(1); see also 47 Fed. Reg. 57624 (December 27, 1982). EPA concluded that agriculture pesticides are "effectively regulated by the

marketplace." 44 Fed. Reg. 27932, 27938 (col. 3) (May 11, 1979), and that waiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of its "primary mandate under FIFRA": investigating "the health and safety aspects of pesticides." 47 Fed. Reg. 53192 (November 24, 1982); 47 Fed. Reg. 40659, 40661 (col. 1) (September 15, 1982). EPA pointed to private legal actions for damages as one factor that would ensure that pesticide manufactures sold an efficacious product: "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use." 47 Fed. Reg. 40659, 40661 (col. 2) (September 15, 1982).

FIFRA permits states broad authority to regulate pesticides but makes it unlawful for states that undertake such regulation to "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b). A number of federal court decisions have held that this preemption of state authority as to pesticide labels bars damage claims in state court by growers against pesticide manufacturers. The courts have reasoned that allowing such a claim by a grower would be, in effect, permitting the state to impose label requirements "in addition to or different from" the federally-approved label.

There have been several recent preemption decisions involving claims by growers concerning pesticidal efficacy or property damage caused by a pesticide. For example, in Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995), several growers sued the manufacturers and distributor of a pesticide that the growers alleged had damaged their cotton crop even through they had applied the pesticide according to the label directions. The court denied the growers' claims on the ground that allowing recovery of damages would interfere indirectly with EPA's "rigorous

label-approval process." Id. at 560. In Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995), and Worm v. American Cyanamid, Inc., 5 F.3d 744 (4th Cir. 1993), growers sued a pesticide manufacturer seeking recovery for harm to crops allegedly caused when the manufacturer's herbicide remained in the soil and damaged rotated crops. Both courts dismissed the growers' claims noting that EPA's labeling regulations required instructions on rotational crop restrictions. The courts reasoned that to permit such lawsuits "would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations." Welchert, 59 F.3d at 73; Worm, 5 F.3d at 749.

These court decisions are based on the premise that, in approving labels for agricultural pesticides, EPA examines, or at least has the obligation to examine, the efficacy of the pesticide and related issues such as the potential for the pesticide to cause property damage. The courts, however, have not taken into account the plain language of the statute on this issue and have misinterpreted the thrust of EPA's regulations. As noted above, in actual fact, EPA, with Congress' approval, stopped evaluating pesticide efficacy for routine label approvals almost two decades ago. Further, as explained below, EPA's regulations do not require a review of efficacy of property damage issues for agricultural pesticides.

Finally, as to pesticide users this Notice is intended to clarify that EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage.

The Supreme Court of California in Etcheverry v. Tri-Ag Service, Inc., supra, recently discussed (PR) Notice

96-4. The claimants in Etcheverry contended that their walnut crop was damaged because of inadequate labeling of certain pesticides. The trial court granted a summary judgment holding that claimants' claims were preempted by FIFRA. The United States filed an amicus curiae brief on behalf of the claimants citing (PR) Notice 96-4 and argued that the case involved pesticide efficacy and that claimants' state law claims were not preempted by FIFRA.

The Supreme Court of California first concluded that claimants were not claiming that the pesticides they used were "inefficacious" but rather that they claimed that they should have been warned that the combined use of pesticides could be "phytotoxic." The court discussed the EPA's guidelines regarding "phytotoxicity" as distinguished from "efficacy" and stated that "Phytotoxicity is not a matter of efficacy." The court continued:

> Because the EPA does not review efficacy claims, the United States asserts, "preemption of state damages actions challenging pesticide efficacy would leave such statements largely, or entirely, unregulated."
>
> Again, the short answer to this argument is that the EPA's waiver of the submission of efficacy data is irrelevant, since plaintiffs complain of phytotoxicity, not inefficacy. However, even assuming arguendo that phytotoxicity is included within the concept of efficacy, there remain two fundamental flaws in the argument that pesticide efficacy will go "largely, or entirely, unregulated" if state failure-to-warn claims are preempted: (1) Although the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial

> registration, the agency does require and review such data if efficacy-related problems develop later; and (2) California has a comprehensive registration and regulatory program for pesticides, and while the California Department of Pesticide Regulation may not impose its own requirements for labeling, it can restrict or prohibit the sale or use of products that it determines are inefficacious or phytotoxic.

The court concluded that FIFRA preempts state law claims for failure to warn of the risks of using a pesticide. We do not agree with the Etcheverry court that the court's answers to the questions raised by the United States determine the issue of federal preemption.

The court in Nathan Kimmel, Inc. v. DowElanco, 64 F. Supp. 2d 939 (C.D. Cal. 1999), recognized that the EPA stated in (PR) Notice 96-4 that it has exercised its statutory option to waive certain data requirements under FIFRA. The court, however, concluded:

> While these are valid arguments, the Court is bound by the currently-existing law of this circuit. Therefore, though the Court encourages Kimmel to raise these issues on appeal, the Court must find Kimmel's claims preempted.

We do not believe that Congress intended to preempt state law efficacy claims after the EPA exercised its authority and, as noted in (PR) Notice 96-4, "stopped evaluating pesticide efficacy for routine label approvals almost two decades ago." The purpose of Congress is the ultimate touchstone in every preemption case. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

We point out that our decision is not in conflict with

our supreme court's opinion in Quest Chemical Corporation v. Elam, supra. That case involved personal injuries resulting from the use of a product. This case involves the efficacy of the tank mix combination of the products and property damage. (PR) Notice 96-4 expressly states that:

> [W]aiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of its "primary mandate under FIFRA": investigating "the health and safety aspects of pesticides."

We hold that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA because such claims involve the efficacy of the products and not the risks to humans and the environment posed by the use of the product.

The judgment of the trial court is reversed, and the cause is remanded.

_____/s/_____
AUSTIN McCLOUD
SENIOR JUSTICE

November 16, 2000

Publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, C.J, and McCall, J., and McCloud, S.J.[4]

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[4] Austin McCloud, Retired Chief Justice, Court of Appeals, 11th District of Texas at Eastland sitting by assignment.

APPENDIX C

No. 35,851

TERRY GEYE AND BRANDON GEYE	*	IN THE DISTRICT COURT OF
VS.	*	EASTLAND COUNTY, TEXAS
AMERICAN CYANAMID COMPANY	*	91st JUDICIAL DISTRICT

FINAL JUDGMENT

Came on to be heard on the 21st day of August, 1998, Defendant's Motion for Summary Judgment and Defendant's First Supplement to its Motion for Summary Judgment and, in the Alternative, Motion for Partial Summary Judgment and, having considered same, Plaintiffs' Responses, other pleadings and motions filed, the record and the applicable authorities, this Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED.

It is, therefore, ORDERED, ADJUDGED AND DECREED that a final summary judgment is hereby granted to Defendant on the ground that each and all of the Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, et seq.; that Plaintiffs shall take nothing by their suit; and that Defendant, American Cyanamid Company, may recover court costs from the Plaintiffs, Terry Geye and Brandon Geye, jointly and severally.

IT IS FURTHER ORDERED and DECREED that taxable court costs are to be paid by the Plaintiffs, for which

let execution issue.

The Court DENIES all relief not granted in this judgment.

SIGNED this 26th day of January, 1999.

/s/
JUDGE PRESIDING

TERRY BRADSHAW
OFFICIAL COURT REPORTER

LAVERN KEY
COURT ADMINISTRATOR

STEVEN R. HEROD
DISTRICT JUDGE
91ST JUDICIAL DISTRICT
EASTLAND COUNTY COURTHOUSE
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October 22, 1998

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Re: No. 35,8512 Terry Geye and Brandon Geye vs. American Cyanamid Company, Voluntary Purchasing Croups, Inc., and Lawrence Farm & Ranch Supply, Inc.

Gentlemen:

I have read your motions, responses and the cases you have cited. I have also considered the pleadings, the exhibits, the summary judgment evidence before the Court and the argument of counsel.

By this letter you are informed that I have concluded and find that the defendants are entitled to summary judgment as a matter of law as to each of plaintiffs' claims as those claims are directly or indirectly related to the product's labeling and therefore preempted by FIFRA.

Sincerely,

_____/s/_____

Steven R. Herod

SH/tb

APPENDIX D

40 C.F.R. § 158.540 Plant protection data requirements.

(b) NOTES. – The following notes are referenced in column two of the table contained in paragraph (a) of this section.

[Target area phytotoxicity]

(1) Data are required for Special Review and certain public health situations.

40 C.F.R. § 158.640 Product performance data requirements.

(b) Notes: The following notes are referenced in column two of the table contained in paragraph (a) of this section.

(1) The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot readily be observed by the user including, but not limited to, microorganisms infectious to man in any area of the inanimate environment or a claim to control vertebrates (such as rodents, birds, bats, canids, and skunks) that may directly or indirectly transmit diseases to humans. However, each registrant must ensure through testing that his products are efficacious when used in accordance with label directions and commonly accepted pest control practices. The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration.